

A prior preliminary hearing was held in this case on August 16, 1994. Subsequently, on August 22, 1994, the Administrative Law Judge entered a Preliminary Hearing Order

which ordered the respondent and its insurance carrier, Thomas McGee & Sons, to provide medical treatment for claimant's injuries through George Lucas, M.D., and for payment of medical bills. That Preliminary Hearing Order was appealed by the respondent and its insurance carrier, Thomas McGee & Sons, to the Appeals Board. The single issue raised by the respondent on appeal was whether the claimant's alleged accidental injuries arose out of and in the course of his employment with the respondent. The Appeals Board reversed the Administrative Law Judge and in an Order dated February 27, 1995, denied claimant's request for preliminary benefits on the basis that the claimant had failed to prove that it was more probably true than not that her alleged accidental injuries were a result of her work activities while employed by the respondent.

Following the Appeals Board Order, claimant took the evidentiary deposition of George Lucas, M.D., on July 19, 1995. Claimant then filed another request for a preliminary hearing which was held before the Administrative Law Judge on September 26, 1995 and is the subject of this appeal. No witnesses testified at this preliminary hearing but attorneys for the parties presented argument and the claimant introduced Dr. Lucas' deposition as evidence to be considered in the proceedings.

Claimant argues that the testimony of Dr. Lucas proves that her request for medical treatment and temporary total disability benefits are the result of an accidental injury that arose out of and in the course of claimant's employment with the respondent. On the other hand, the respondent argues that since the issue of whether the claimant's accidental injury arose out of and in the course of her employment with the respondent had previously been decided by the Appeals Board, the Administrative Law Judge did not have jurisdiction to consider this rehearing request and, therefore, the Appeals Board lacks jurisdiction to review the resulting preliminary hearing order.

The Administrative Law Judge, in his Order of September 26, 1995, denied claimant's request for preliminary benefits finding that he was bound by the February 27, 1995 Order of the Appeals Board that found the claim not compensable. From that finding, it is impossible for the Appeals Board to ascertain whether the Administrative Law Judge considered the arguments that the parties made during the preliminary hearing held on September 26, 1995 and the evidentiary deposition of George Lucas, M.D. The Appeals Board finds that the Administrative Law Judge has the discretion to reconsider a preliminary hearing issue both after the Administrative Law Judge has entered a preliminary hearing order and after the Appeals Board has entered an order on review if there is new or additional evidence to consider. K.S.A. 44-534a does not limit the number of applications for preliminary hearing that may be filed by a party.

The Appeals Board concludes that the Preliminary Hearing Order of Administrative Law Judge John D. Clark dated September 26, 1995 should be remanded with directions that the arguments of the parties contained in the preliminary hearing transcript and the evidentiary deposition of George Lucas, M.D., should be considered by the Administrative Law Judge. A Preliminary Hearing Order should then be entered by the Administrative Law Judge that either grants or denies claimant's request for preliminary benefits with the specific findings and conclusions contained in the Order that formed the basis for the decision.

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Preliminary Hearing Order entered by Administrative Law Judge John D. Clark dated September 26, 1995 should be, and the same hereby is, remanded to Administrative Law

Judge John D. Clark in accordance with the directions as specifically set forth in this Order.
The Appeals Board does not retain jurisdiction over this proceeding.

IT IS SO ORDERED.

Dated this ____ day of January 1996.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: James B. Zongker, Wichita, Kansas
Laura Thompson, Overland Park, Kansas
Joel P. Hesse, Wichita, Kansas
Gary A. Winfrey, Wichita, Kansas
Kirby A. Vernon, Wichita, Kansas
John D. Clark, Administrative Law Judge
Philip S. Harness, Director